Pendakwa Raya v Hossein Roshangah and Anor (Part 2)

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–12 OF 2001
KN SEGARA J
16 MAY 2007

Evidence — Burden of proof — Dangerous drugs — Whether the burden is on the prosecution to proof the substance analysed by the chemist is not medicinal opium

Evidence — Presumption — Failure to call witness — Whether failure to offer witness to defence fatal to the prosecution's case

Evidence — Weight — Disparity in the weight of the drugs — Whether fatal for the prosecution to proof their case beyond reasonable doubt

The first and second accused were charged with two offences under the Dangerous Drugs Act 1952 ('the Act'), that is, firstly, for an offence under s 39B(1)(a) for trafficking in 16,551 gm of raw opium and, secondly, for an offence under s 39A(2) for possession of 543.5 gm of raw opium. Both the accused were acquitted and discharged without their defence being called. The Public Prosecutor appealed against the order of acquittal by this Court. The Court of Appeal allowed the appeal of the prosecution and directed that the defence of both the accused be called in respect of the charge of trafficking, and directed that the defence only of the first accused to be called on the charge under s 39A(2). The defence of the accused was essentially that they were not in possession of the subject matter of the charges. Amir is the first accused's son. Hassan Roshanagh is his brother. The second accused is his bother-in-law. He testified that his brother, Hassan lived in Johor Bahru. Whenever Hassan comes down to Kuala Lumpur he stays at the apartment of the first accused. Hassan has a set of keys to the first accused's apartment. The first accused had also introduced his brother Hassan to Rashid, about a week after he had met Rashid at the disco. Rashid requested the first accused to pass on his tenancy to him and the first accused agreed. On 5 November 1999, Rashid came to occupy the apartment, pursuant to the arrangement made with the first accused. Rashid brought two or three luggage bags and two or three boxes. Rashid occupied the master-bedroom. The second accused came from Johor Bahru with Hassan to the first accused's apartment as he wanted to return to Iran. The first accused testified that on 16 November 1999, at 4.00 p.m, Rashid came to the apartment bringing along a bag. He took the bag into the master bedroom. At about 8.30 p.m, Rashid left the apartment with the bag and told the first accused that he would not be returning to the apartment that night. The first accused testified that on 16 November 1999, he went to bed between 12 midnight and 12.30 a.m. He woke up at about 1.30 a.m. to ease himself. When he came out of the bathroom, he heard

A a noise at the grille door of the apartment. He suspected that there were robbers attempting to break in. He went and woke up the second accused and asked him to come out of his room. Whilst he was talking to the second accused, in the passageway leading to the rooms, he heard the doorbell ringing. He went towards the door of the apartment uttering, 'Yes, Yes' and someone identified saying 'Police'. The first accused opened the door of the apartment on 17 November 1999 at about 1.30 a.m. to allow the police to enter his apartment. He testified that he did not know the actual name of Rashid until the passport was tendered in court by the police and the name 'Shaban Jirieirdmusa' appeared on the said passport found in his clutch bag. The first accused testified that before the police came to his apartment, he did not at anytime keep any opium in his apartment. He did not know whether there was any opium in his house. The issues in this case were: (1) Whose burden was it to proof the substance analysed by the chemist is not medicinal opium; (2) Whether failure to call Hassan or Rashid is fatal to the prosecution's case; and (3) Whether the disparity in the weight of the drugs stated in the opening address by DPP, the police report and that analysed by the chemist is fatal for the prosecution to prove their case beyond a reasonable doubt on the issue of possession of drugs and the identity of the drugs.

Held, acquitting and discharging both the accused:

(1) The burden is on the prosecution to adduce prima facie evidence that the substance analysed by the chemist is not medicinal opium. The chemist's testimony that the substance analysed is raw opium as defined under s 2 of the Act is insufficient to discharge the prosecution's burden of proof on the subject matter of the charge, without an affirmative assertion by the chemist (supported by his examination and analysis of the subject matter) that it is not medicinal opium. On this ground itself, the prosecution has failed to establish a prima facie case against the accused (see para 10).

(2) Upon a re-evaluation of the prosecution's evidence against the accused and the material gaps in the prosecution's evidence, particularly, the failure to call Hassan Roshangah and Shaban Jahangirieird Musa (Rashid) to testify on behalf of the prosecution (or alternatively, to have taken a statement from both of them and made them available to the defence, in the event the prosecution elected not to call upon them to testify) coupled with the disparity in the weight of the drugs stated in the opening address by DPP, the police report and that analysed by the chemist, the prosecution have failed miserably to prove their case beyond a reasonable doubt on the issue of possession of drugs and the identity of the drugs (see para 7).

(3) The prosecution has failed to establish beyond reasonable doubt, that the subject matter of the charge is, in law and in fact, raw opium, and that the accused were in possession of the said raw opium, at the material date, time and place (see para 52).

[Bahasa Malaysia summary

Tertuduh Pertama dan Kedua telah dituduh dengan dua kesalahan di bawah Akta Dadah Berbahaya (1952) (Akta), iaitu, yang pertama, untuk kesalahan di bawah

s.39B(1) kerana mengedar 16,551 gm candu mentah dan, yang kedua, untuk kesalahan di bawah s.39A(2) kerana memiliki 543.5 gm candu mentah. Kedua-dua tertuduh telah dibebaskan dan dilepaskan tanpa pembelaan dipanggil. Pendakwaraya merayu terhadap perintah pembebasan oleh Mahkamah ini. Mahkamah Rayuan membenarkan rayuan pendakwaan dan mengarahkan bahawa pembelaan kedua-dua tertuduh dipanggil berkenaan dengan pertuduhan mengedar, dan mengarahkan pembelaan dipanggil hanya untuk tertuduh pertama ke atas pertuduhan di bawah s39A(2). Pembelaan bagi tertuduh, bahawa mereka tidak memiliki sebagaimana perkara pokok yang dituduh. Amir merupakan anak tertuduh pertama. Hassan Roshanagh adalah abangnya. Tertuduh kedua adalah abang iparnya. Beliau memberi keterangan bahawa abangnya, Hasssan, telah tinggal di Johor Bahru. Apabila Hassan ke Kuala Lumpur, beliau akan menetap di pangsapuri tertuduh pertama. Hassan mempunyai kunci-kunci kepada pangsapuri tertuduh pertama. Tertuduh pertama telah memperkenalkan abangnya Hassan kepada Rashid, selepas seminggu beliau berjumpa dengan Rashid di sebuah disko. Rashid telah meminta tertuduh pertama untuk menyerahkan penyewaanya kepadanya dan tertuduh pertama bersetuju. Pada 5 November 1999 Rashid telah pergi untuk mendiami pangsapuri tersebut, menurut kepada perjanjian yang telah dibuat dengan tertuduh pertama. Rashid telah membawa 2 atau 3 beg-beg barangan dan 2 atau 3 buah kotak. Rashid mendiami bilik utama. Tertuduh kedua datang daripada Johor Bahru dengan Hassan ke apatmen tertuduh pertama memandangkan dia hendak kembali ke Iran. Tertuduh pertama memberikan keterangan bahawa pada 16 November 1999, lebih kurang jam 4 petang, Rashid telah pergi ke apartmen dengan membawa bersama-samanya sebuah beg. Beliau telah membawa beg tersebut ke bilik utama. Pada kira-kira jam 8.30 malam, Rashid telah meninggalkan pangsapuri dengan beg dan, memaklumkan tertuduh pertama bahawa dia tidak akan kembali ke pangsapuri pada malam itu. Tertuduh pertama memberikan keterangan bahawa pada 16 November 1999, dia telah pergi ke bilik tersebut antara 12 tengah malam dan 12.30 pagi. Dia telah bangun pada jam 1.30 untuk melapangkan dirinya. Bila dia keluar daripada bilik air, dia terdengar bunyi bising dibahagian pintu jeriji besi apatmennya. Dia mengesyaki bahawa terdapat perompak-perompak ingin memecah masuk apatmennya. Dia telah pergi mengejutkan tertuduh kedua dan menyuruhnya keluar dari biliknya. Semasa, dia bercakap dengan tertuduh kedua, dalam ruangan lorong ke bilik-bilik, dia terdengar bunyi loceng pintu. Dia telah pergi ke pintu apatmen dengan mengatakan, "Ya, Ya" dan seseorang telah memperkenalkan diri sebagai "Polis". Tertuduh pertama membuka pintu apatmen pada 17 November 1999 kira-kira jam 1.30 pagi untuk membenarkan polis memasuki pangsapurinya. Dia memberikan keterangan bahawa dia tidak tahu nama sebenar Rashid sehinggalah pasport dikemukakan di Mahkamah oleh polis, dan nama 'Shaban Jirieirdmusa" tertera pada passport tersebut yang dijumpai dalam beg tangannya. Tertuduh pertama memberikan keterangan bahawa, sebelum polis datang ke pangsapurinya, dia tidak pernah pada setiap masa menyimpan candu di pangsapurinya. Dia tidak tahu terdapat sebarang candu dalam rumahnya. Isu-isu dalam kes ini adalah;(1) Beban siapakah untuk membuktikan bahan yang dianalisa oleh jurukmia adalah bukan candu yang digunakan sebagai ubat-ubatan; (2) Sama ada kegagalan untuk memanggil Hassan atau Rashid merosakkan kes pendakwaan; dan (3) Sama ada ketidaksamaan dalam berat dadah-dadah yang dinyatakan dalam ucapan pembukaan oleh Timbalan Pendakwaraya, laporan polis dan analisa juru kimia adalah merosakkan pendakwaan

untuk membuktikan kesnya melampaui keraguan munasabah ke atas isu-isu pemilikkan dadah-dadah dan juga identiti dadah-dadah tersebut.

Diputuskan, membebaskan dan melepaskan kedua-dua tertuduh:

(1) Beban adalah ke atas pendakwaan untuk mengemukakan keterangan prima facie bahawa bahan yang dianalisa oleh jurukimia adalah bukan candu untuk perubatan. Keterangan jurukimia bahawa bahan yang dianalisa adalah candu mentah sebagaimana didefinisikan di bawah s.2 Akta adalah tidak memadai untuk melepaskan beban pembuktian pendakwaan ke atas perkara pokok pertuduhan, tanpa pengataan affirmatif oleh jurukimia (yang disokong oleh pemeriksaannya dan analisa perkara pokok) bahawa ia bukan candu untuk perubatan. Atas alasan ini, pendakwaan telah gagal untuk menetapkan kes prima facie terhadap tertuduh (lihat perenggan 10).

(2) Selepas penilaian semula keterangan pendakwaan terhadap tertuduh dan kekosongan material dalam keterangan pendakwaan, khususnya kegagalan memanggil Hassan Roshangah dan Shaban Jahangirieird Musa (Rashid) untuk memberi keterangan bagi pihak pendakwaan (atau secara alternatifnya, untuk mengambil pernyataan daripada kedua-dua mereka dan boleh digunakan kepada pembelaan, dalam keadaaan pendakwaan telah memilih untuk tidak memanggil mereka untuk memberikan keterangan), ditambah dengan ketidaksamaan berat dadah-dadah yang dinyatakan dalam ucapan pembukaan telah gagal untuk membuktikan kes melampaui keraguan yang munasabah terhadap isu pemilikan dadah-dadah dan identiti dadah tersebut (lihat perenggan 7).

(3) Pendakwaan telah gagal untuk menetapkan, melampaui keraguan munasabah, bahawa perkara pokok pertuduhan, dalam perundangan dan dalam fakta, adalah candu mentah, dan bahawa tertuduh telah memiliki candu mentah tersebut, pada tarikh, masa dan tempat yang material (lihat perenggan 52).]

Notes

For the case on dangerous drugs, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 537.

For the case on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2052.

For cases on weight of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2569–2582.

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39A(2), 39B(1)(a)

Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor) for the prosecution.
Gurbachan Singh (Bachan & Kartar) for both the accused.

KN Segara J:

[1] The first and second accused were charged with two offences under the Dangerous Drugs Act 1952, that is, firstly, for an offence under s 39B(l)(a) for

trafficking in 16,551gm of raw opium and, secondly, for an offence under s 39A(2) for possession of 543.5 gm of raw opium. Both offences were allegedly committed on the same date, time and place, that is 17 November 1999, at 1.50 a.m, Apartment No S 2B/7/5 South View One Ampang Avenue, Jalan Ampang Utara 2–1, Ampang Jaya. Both the accused were acquitted and discharged without their defence being called on 5 February 2003.

[2] The Public Prosecutor appealed against the order of acquittal by this Court. The Court of Appeal allowed the appeal of the prosecution and directed that the defence of both the accused be called in respect of the charge of trafficking, and directed the defence only of the first accused to be called on the charge under s 39A(2). The second accused's acquittal on the charge under s 39A(2) was upheld by the Court of Appeal.

[3] The defence of the accused was accordingly called and both accused elected to give evidence on oath. To corroborate certain aspects of their evidence, the defence also called upon two witnesses to testify on their behalf, as well.

[4] The learned defence counsel, in the course of his reply to the learned DPP's submission at the close of the case for the defence, said:

> No written judgement from Court of Appeal —DPP's submission on the reasons for the Court of Appeal allowing the appeal should be disregarded. I was at the Court of Appeal. The present DPP was not having conduct of the appeal. The Court of Appeal was presided over by Justice Dato Kader Sulaiman. All that was said by the Presiding Judge at the end of the appeal was that "We are allowing the appeal of the Public Prosecutor on the first charge. We are of the view that an explanation is required. As regards the second charge the acquittal of the second accused is upheld and the appeal against the first accused is allowed'. That was all that was said and the case reverted to the High Court with no written grounds or even oral grounds delivered.

[5] I am in full agreement with learned defence counsel. I have to disregard the learned DPP's submissions on the reasons for the Court of Appeal allowing the appeal. I do not have the benefit of the Court of Appeal's grounds of decision before me. The grounds of decision of this court for not calling the defence is contained in the written grounds already delivered. I shall not repeat the said grounds in detail again in this judgment. All I wish to stress is, that at the close of the prosecution's case, this court was of the view, upon an evaluation of the evidence before the court, the prosecution had failed to prove possession, let alone mens rea possession, by the accused of the drugs forming the subject matter of the charge and, that they had exclusive occupation of the apartment (including the master bedroom of the apartment). In the circumstances, this court had ruled that the prosecution had failed to prove a prima facie case against the accused and, accordingly, both the accused were acquitted and discharged without their defence being called.

A copy of the grounds of judgment dated 5 February 2003 is attached as an 'ANNEXURE' for ease of reference and comprehension

[6] Both the accused have now given an explanation in this court, as directed by the Court of Appeal. It is more than apparent, from their defence, that this court was

fully justified in acquitting the accused without calling for their defence, in the first instance. I shall set out, shortly, what both the accused had to say in their defence. This court has no qualms in accepting their defence.

[7] Upon a re-evaluation of the prosecution's evidence against the accused and the material gaps in the prosecution's evidence, particularly, the failure to call Hassan Roshangah and Shaban Jahangirieird Musa (Rashid) to testify on behalf of the prosecution (or alternatively, to have taken a statement from both of them and made them available to the defence, in the event the prosecution elected not to call upon them to testify), coupled with the disparity in the weight of the drugs stated in the opening address by DPP (P 5 — 17154.5 gm), the police report (P 87–15360 gm) and that analysed by the chemist (17194.5 gm), the prosecution have failed miserably to prove their case beyond a reasonable doubt on the issue of the possession of the drugs and the identity of the drugs seized, at the close of the case for the defence. Therefore, in the circumstances of this case, it is totally futile and irrelevant to consider the issue of 'trafficking'.

[8] However, before I set out the explanation proffered by the accused, I think I shall first deal with a very crucial aspect of the ingredient of the charge, which was not proved by the prosecution at the close of the case for the prosecution, and which failure entitled the accused to an acquittal, ipso facto. Unfortunately, the Court's attention was not drawn to the law on the said ingredient in the first instance, and the court had not taken the same into consideration, when acquitting them without their defence being called.

[9] The drug which is the subject matter of the charge is 'raw opium'. Under s 2 Dangerous Drugs Act 1952 'raw opium' means

> the coagulated juice obtained from any plant from which morphine may be produced, whatever its content of morphine and in whatever form the coagulated juice is, but does not include medicinal opium;
>
> medicinal opium means raw opium which has undergone the processes necessary to adapt it for medicinal use**in accordance with the requirements of the British Pharmacopoeia,** whether in powder form or granulated **or otherwise,**or mixed with neutral materials
>
> (emphasis provided)

[10] An essential ingredient in both the charges to be proved by the prosecution is that the drug trafficked, or in the possession of the accused, is 'raw opium' and that the said raw opium is not medicinal opium The burden is on the prosecution to adduce prima facie evidence that the substance analysed by the chemist is not medicinal opium. The chemist's testimony that the substance analysed is raw opium as defined under s 2 Dangerous Drugs Act is insufficient to discharge the prosecution's burden of proof on the subject matter of the charge, without an affirmative assertion by the chemist (supported by his examination and analysis of the subject matter) that it is not medicinal opium.

[11] When is raw opium not medicinal opium? In fact, raw opium and medicinal opium can be identical. The chemist's testimony, In raw opium the morphine content is found to be in the range of 10% -15%. In this case the morphine content found in each of the dark brown substance examined was about 14% which is consistent with the normal content of raw opium, does not inspire confidence as to his knowledge and expertise on raw opium, in the light of the definition of raw opium under s 2 Dangerous Drugs Act, which by the use of the expression, 'whatever its content of morphine in the coagulated juice obtained from any plant from which morphine may be produced, necessarily implies that the percentage of morphine content is not the criteria in determining whether a substance is raw opium or not. In fact, by its very definition, the substance to be raw opium must be coagulated juice from plant material from which morphine may be produced. The chemist never even testified that the 'dark brown substance' examined was 'coagulated juice'. The chemist's testimony under cross-examination, 'I agree by physically looking at a dark brown substance I could not establish that it is raw opium', has made the task on the prosecution of establishing knowledge of the substance in the possession of the accused even more onerous [N.B: The police witness described the substance to be 'black' in colour whereas the chemist refers to the substance examined to be dark brown.]

[12] It is not for the accused to raise the issue of medicinal opium with the chemist, in cross-examination, when the chemist has not uttered a word about medicinal opium in relation to the substance he analysed, under examination-in-chief. The burden of proof on the prosecution to prove every ingredient of the charge never shifts in the absence of any statutory provision. The law does not require the accused to establish the subject matter of the charge is medicinal opium. The chemist's testimony has created a serious doubt as to whether the substance he analysed is, both, in fact and in law, raw opium and not medicinal opium. On this ground itself, the prosecution has failed to establish a prima facie case against the accused and, therefore, both the accused are entitled to an acquittal without their defence being called on both the charges.

[13] Now, I shall proceed to consider the defence of the accused, which is essentially that they were not in possession of the subject matter of the charges.

[14] Both the first accused and the second accused are citizens of Iran. Both accused gave evidence on oath. They speak and understand very well only the Parsi language and, quite obviously, have difficulty in understanding and communicating effectively in Bahasa Malaysia or English. A Parsi interpreter was made available throughout the trial.

[15] The evidence for the defence is briefly as follows:

[16] The first accused came to Malaysia to seek business opportunities and make investments. He came to Malaysia sometime in May 1999 and signed a tenancy agreement, for an apartment, with the owner of Apartment No. S 2B/7/5 South View One, Ampang Avenue, Jalan Ampang Utara, Ampang Jaya, through a housing agent. The rental was RM1800 per month. He paid RM1800 being 1 month's rental in

advance, and RM 3600, as deposit, to the agent and went into occupation of the apartment in May 1999. It was in this apartment that the first and second accused were arrested on 17 November 1999, at about 1.50 a.m. This apartment has a master bedroom with an attached bathroom, two other bedrooms, a store room, a kitchen and a common bathroom (see exh P 8).

[17] By a notice dated 12 October 1999, he gave the housing agent notice to terminate his tenancy, with effect from 27 December 1999, as he wanted to return to Iran. He asked the agent to set off the one month's advance rental and deposit paid against the rental due from the date of his notice, but the agent only agreed to set off the sum RM3600 he had paid as deposit.

[18] Amir is first accused's son. Hassan Roshanagh is his brother. The second accused is his bother-in-law. He testified that his brother, Hassan has been in Malaysia for 15 years. Hassan lived in Johor Bahru with his wife and son. Hassan has business dealings in Singapore and Malaysia. Hassan owned a car Honda Accord No WFJ 1053. Whenever Hassan comes down to Kuala Lumpur from Johor Bahru, he stays at the apartment of the first accused. Hassan has a set of keys to the first accused's apartment. ('Semasa saya tinggal di tempat saya ditangkap, Hassan ada datang dan tinggal bersama-sama saya. Rumah Hassan adalah di Johor Bahru dan apabila dia datang he Kuala Lumpur, dia tinggal di rumah saya tersebut. **Hassan mempunyai kunci kepada rumah saya.**There are 3 rooms in the apartment, a master bedroom with an attached bathroom and 2 other rooms.

[19] The first accused testified, that in early November 1999 he used to frequent a disco, called 'Imperial', in Jalan Sultan Ismail, Kuala Lumpur and there he had met a fellow country man from Iran, named Rashid. The first accused had also introduced his brother, Hassan to Rashid about a week after he had met Rashid at the disco. In the meantime, the first accused had already given notice of termination of his tenancy of his apartment, with effect from 27 December 1999, to his housing agent, and he informed Rashid of this, as Rashid was looking for accommodation for himself. Rashid requested the first accused to pass on his tenancy to him if he could. The first accused agreed to allow Rashid to stay in the apartment and requested for RM3600 from Rashid. This arrangement was made sometime on 4th or 5th November 1999.

[20] On 5 November 1999, Rashid came to occupy the apartment, pursuant to the arrangement made with the first accused. Rashid's friend helped bring his things, on 5 November 1999, to the apartment. Rashid brought two or three luggage bags and two or three boxes. Rashid occupied the master-bedroom. He kept the bags and the boxes in the store and his clothing in the cupboard in the master bedroom. Before Rashid came, the first accused used the said cupboard to keep his own clothing, but he had emptied it of his clothing before Rashid's arrival on 5 November 1999. He used the cupboard in the smaller room ('BILIK 3' in the sketch plan P 8) he occupied after Rashid moved into the apartment on 5 November 1999. Rashid occupied the master bedroom. He testified, that the photograph P 9L showing a cupboard with clothing, in the master bedroom, was in fact the clothing of Rashid.

[21] The first accused identified photograph P 9J as showing the master-bedroom. He testified the trouser seen lying on the floor belongs to him and what is seen hanging on the door looks like clothing. He testified a shirt hanging on the door belongs to him- the shirt beside the black/red coloured shirt. He testified, other than the trouser on the floor and the shirt hanging on the door, none of the other clothing in the master bedroom on 16 November 1999, belonged to him. He identified that the trouser (P 33) and the belt (P 34) as belonging to him. He did not dispute the belt came with a small zipper compartment on the reverse side of it. He said on 16 November 1999, he had kept a herbal medicine in the zipper compartment of the belt to use to ease breathing difficulty ('Pada 16 November 1999 saya ada simpan satu benda dalam ruang berzip P 34. Saya telah simpan ubat herba dalam ruang tersebut bagi sesak nafas. Saya dapat ubat herba tersebut dari Iran.').

[22] On 14 November 1999, the second accused came from Johor Bahru with Hassan to the first accused's apartment as he wanted to return to Iran on 16 November 1999. However, the first accused had suggested to the second accused to cancel his plan to leave for Iran on 16 November 1999 and, instead, fly back to Iran together with him, on 20 November 1999. The second accused accepted his suggestion, which was made to him on the night of 14 November 1999, soon after his arrival from Johor Bahru with Hassan.

[23] The first accused testified that on 16 November 1999, at 4.00 p.m, Rashid came to the apartment bringing along a bag. He took the bag into the room he was occupying, that is, the master bedroom. At about 8.30p.m, Rashid left the apartment with the bag and, told the first accused that he would not be returning to the apartment that night because he was going to spend the night at his friend's apartment above, on the 8th floor. He informed first accused he would be going to the disco with his friend and would sleep over-night in his friend's apartment.

[24] (Betul Rashid telah datang ke rumah saya pada 16/11/99 jam 4.00 petang. Rashid membawa bersama-samanya satu beg. Malam 16/11/99 jam lebihkurang 8.30 malam Rashid keluar dari rumah saya bersama-sama beg tersebut. Sewaktu dia datang pukul 4.00 petang 16/11/99, dia telah membawa beg itu ke biliknya — iaitu bilik master bedroom. Apabila Rashid keluar bersama-sama beg tersebut jam 8.30 malam, dia memberitahu saya dia tidak akan balik ke rumah pada malam itu kerana dia akan bermalam di rumah kawannya iaitu diatas tingkat 8–5. Rashid juga ada memberitahu dia akan pergi ke Disko bersama-sama kawannya dan selepas itu akan tidur di rumah kawannya itu. Rashid memberitahu saya tentang perkara ini, OKTjuga ada bersama-sama kami di ruang tamu kerana OKT2 dan saya sedia untuk keluar makan malam pada waktu Rashid ingin keluar.").

[25] Soon after Rashid left the apartment at about 8.30 p.m, on 16 November 1999, he went out for dinner with the second accused and returned to the apartment at about 10.30 p.m. He testified that on the night of 16 November 1999, he slept in the master bedroom whilst the second accused slept in the third room of the apartment. He explained that he occupied the master bedroom on the night of 16 November 1999 because Rashid was not going to be there for that night and, he was accustomed to using the master bedroom, as it had an attached bathroom.

A **[26]** The first accused testified that on 16 November 1999 he went to bed between 12 mid-night and 12.30 a.m. He woke up at about 1.30 a.m. to ease himself. He switched on the master bedroom light but did not switch on the bathroom light as he found the bedroom light sufficient to light up the attached bathroom. He used the bathroom, and when he came out of the bathroom, he heard a noise at the grille door of the apartment. He suspected that there were robbers attempting to break in. He went and woke up the second accused and asked him to come out of his room. Whilst he was talking to the second accused, in the passageway leading to the rooms, he heard the door-bell ringing. He went towards the door of the apartment uttering, 'Yes, Yes' and someone identified saying 'Police'. The first accused opened the door. He then told the second accused in Parsi, not to worry, as there was no problem and, before he could finish talking to the second accused, two persons attacked him and hand-cuffed him from behind.

[27] The first accused testified there were two Chinese police. One of them kicked the second accused, who was then standing in front of the master bedroom. The second accused cried when he was being kicked. He said, 'No, No'. The second accused was then handcuffed. After they were handcuffed the police examined the apartment. He was forced to sit in the hall guarded by two persons whilst the police examined the apartment. At about 5.00 a.m, he was taken to the master bedroom by the police. He saw the second accused and two or three policemen inside the master bedroom. He testified that the police found a clutch bag (exh P 63). Inside the clutch bag, there were not only his personal documents, but also, the passport of Rashid. He testified that he did not know the actual name of Rashid until the passport was tendered in court by the police, and the name 'Shaban Jirieirdmusa' appeared on the said passport (exh P 52) found in his clutch bag.

[28] The first accused testified, that the photo of the holder of passport P 52, found therein is that of the person who had introduced himself as Rashid. He testified that the person in the photo in P 52 is also known to others at the Imperial Disco as Rashid.

[29] The first accused testified that he obtained the passport, P 52 from Rashid, two days before his arrest, that is, on 15 November 1999. He testified that he obtained the passport from Rashid because he wanted to assign his tenancy to Rashid. However, after receiving the passport he did not go and see the housing agent on 15 November 99 because Rashid promised to give him the rent on 16 November 1999, calculated for the period 5 November 1999 to 27 December 1999.

[30] The first accused testified that, before the police came to his apartment on 17 November 99, he did not at anytime keep any opium in his apartment. He testified that, he did not know whether there was any opium in his house, before the police came on 17 November 1999. He testified he did not permit anyone to bring opium into his apartment. He testified he did not know the smell of chandu and, that the 'Herbal Iran' he takes (consumes) does not have any odour. ('Sebelum polis datang pada 17 November 1999, saya tidak pada bila-bila masa simpan candu di rumah saya. Saya tidak tahu terdapat candu di dalam rumah saya sebelum polis

datang pada 17 November 1999. Saya tidak membenarkan sesiapa membawa candu ke dalam rumah saya. Saya tidak tahu bau chandu. Herbal Iran yang saya makan tidak ada bau')

[31] At about 5 a.m., on 17 November 1999, the police took him, together with the second accused, to the place where the bag (exh P 84) was found. When he was brought to the said place, the bag was already opened and its contents exposed. He testified he did not know how the bag came to be there.

[32] The three bags, which the police had seized and produced in court were marked as exhs, P 57, P 74 and P 84. The said exhibits were shown to the first accused by his defence counsel when he was giving his evidence. The first accused testified that Rashid had brought two or three clothing bags and two or three boxes to the apartment, on 5 November 1999. The first accused testified that P 84 was not the bag brought to the apartment on 5 November 1999 but, P 74 was, indeed, one of the three bags brought to the apartment by Rashid, on 5 November 99. He testified that P 57 was his bag.

[33] He testified that Rashid did not open bag P 74 and show him (its contents) when he brought it to the apartment on 5 November 1999. It did not have its original bag handle. It had an improvised string handle to replace the original handle. Although P 74 shown to him in court had a string handle, he testified it was not the similar white string handle that he saw on 5 November 1999.

[34] The first accused claimed that P 57 which was his bag (an Echolac brief-case) contained his personal documents such as, passport, driving license, Iranian I.C., International Driving, Licence, Cheque and Bank book. He testified that he took this bag with him wherever he went as it contained important documents and he was afraid they might get lost. He testified that on 16 November 1999 he had placed this bag in the room he slept that night that is, in the master bedroom. He testified, that he had not, at any time, kept any drug in P 57.

[35] The first accused testified that he opened the door of the apartment on 17 November 1999 at about 1.30 a.m. to allow the police to enter his apartment. He testified he would not have opened the door of the apartment when the police arrived if he had known there were drugs kept in his apartment. He testified that in the third room, which was occupied by the second accused, there was a clothing bag and presents to be taken to Iran. The first accused did not know whether the police had seized the bag found in the third room.

[36] The first accused testified that he had not thrown out bag P 84 through the bathroom window. He testified that when the police came, on 17 November 1999, P 84 was not in the apartment. The first accused testified that P 84 is the bag which Rashid brought to the apartment on 16 November 1999, at about 4.00 p.m, and that Rashid took it into the master bedroom. He further testified that P 84, is the same bag which Rashid took along with him when he left the apartment at 8.00 p.m. The first accused testified that after Rashid took the bag P 84 and left the apartment

at 8.00 p.m, Rashid did not return to the apartment before the police arrived at about 1.30 p.m, on 17 November 1999. He testified that the bag seen in photographs P 9S, T, U, V, W and X, is bag P 84.

[37] The first accused testified that before the police arrived at his apartment on 17 November 1999, at 1.30 a.m, he did not keep any opium in his apartment. He testified he had no knowledge of the existence of any opium in his apartment, before the police arrived on 17 November 1999, at 1.30 a.m. He testified he did not permit anyone to bring opium into his apartment and, before his arrest he had never seen opium, and did not know of its odour. He also testified that before 17 November 1999, he did not possess any of the opium found in the apartment by the police, or deal with the opium, together with the second accused. He also testified he did not bring the drug 'syabu' to the apartment.

[38] The first accused testified he had mentioned the name 'Rashid' to the police when they were in the apartment at 1.30 a.m. on 17 November 1999 and, when the police took a statement from him on 19 November 1999. He testified, that when the second accused came to his apartment from Johor Bahru on 14 November 1999, the second accused had met Rashid in his apartment on 14, 15, and 16 November 1999.

[39] The second accused testified he came to Malaysia about one month before he was arrested. He was arrested on 17 November 1999, at about 1.30 a.m, together with the accused. The first accused is his brother-in-law. He is a citizen of Iran. He came to Malaysia as a tourist.

[40] On his arrival in Kuala Lumpur from Teheran, he stayed a night at the apartment of the first accused, and then went to Johor Bahru with the first accused's brother, Hassan. He stayed in Hassan's house in Johor Bahru for a month.

[41] He left Johor Bahru for Kuala Lumpur on 14 November 1999 with Hassan and arrived at first accused's apartment at about 1.30 a.m., on 15 November 1999. When they arrived, the first accused, his son Amir and Rashid were in the apartment. The first accused, his son Amir, and his brother Hassan slept in the second room whilst the second accused slept in the third room. The second accused's testimony that the first accused occupied the two rooms appear to contradict first accused's testimony, nevertheless, this contradiction is a minor contradiction of no serious consequence to the credibility of both the accused. On 15 November 1999, Rashid was occupying the master bedroom. The second accused testified that when he left Johor Bahru on 14 November 1999 for Kuala Lumpur, he had intended to return to Teheran on 16 November 1999. However, when he arrived in Kuala Lumpur on 15 November 1999, the first accused requested him not to return on 16 November 1999 but, to return together with him on 20 November 99. He testified he agreed to first accused's suggestion.

[42] The second accused testified that Hassan returned to Johor Bahru at 10.00 a.m, on 15 November 1999, together with first accused's son, Amir. The first accused gave Amir two bags to take back to Johor Bahru.

[43] The second accused testified that when he woke up on 15 November 1999, he saw Rashid in the apartment. On the morning of 15 November 1999, at about 10.00 a.m, the first accused introduced Rashid to him. He saw Rashid still using the master bedroom on the morning and evening of 15 November 1999. He also testified that on the morning, afternoon and evening of 16 November 1999, Rashid was still using the master bedroom. The second accused testified that from the morning of 15 November 1999 until he was arrested on the morning of 17 November 99, he had never stepped foot into the master bedroom. He had not kept any of his clothing or personal effects in the master bedroom.

[44] The second accused testified that on 16 November 1999, at about 4.00 p.m, he saw Rashid bring a bag to the first accused's apartment and take it into the master bedroom. At that time, the first accused and he were seated in the hall of the apartment. The second accused further testified that Rashid came out of the master bedroom at about 8.00 p.m. or 8.30 p.m. with a bag similar to the one he had taken into the master bed room at 4.00 p.m. Rashid left the apartment with the bag. The second accused testified he heard Rashid tell the first accused that he would not be returning to the apartment that night and, that he would be sleeping in his friend's apartment, one floor above first accused's apartment

[45] The second accused testified that on 16 November 1999, at about 9.00 p.m, he went out with the second accused to have their dinner. They returned to the apartment between 10.00 p.m. and 11.00 p.m. after their dinner. He testified that he slept in the third room whilst the first accused slept in Rashid's room, that is, in the master bedroom.

[46] On 17 November 1999 he was woken from his sleep by the first accused, who said there were thieves trying to enter the apartment. He got out of his bedroom together with the first accused, and proceeded in the direction of the main door. He stopped in the hall and stood there. The first accused proceeded to the main door to ascertain who were at the door. The first accused opened the front door and then informed him in the Parsi language 'Don't worry. Not thieves. Police officers'. He testified that after that the persons who claimed they were police officers entered the apartment. They were not wearing police uniform. He testified that he was assaulted and a pistol was placed on the top of his head. He was told to sit down by the Chinese man. The second accused testified that when he was assaulted he pleaded in English, 'No! No!' meaning 'don't assault' and cried. He was forced to sit at the place he was arrested and handcuffed with his hands behind his back. He testified that the first accused was forced to sit near the front door and, he too, was handcuffed with his hands behind his back.

[47] The second accused testified that from the moment he was woken up from his sleep by the first accused and till he was forced to sit handcuffed, he did not enter the master bedroom or the bathroom. He testified that he did not, at anytime, throw out a bag through the window of the master bedroom bathroom.

[48] The second accused testified the police brought him, together with the first accused, to the ground floor of the apartment block and showed an open bag.

He further testified the bag, P 84, which was shown to him in court, was the bag which was brought to the apartment by Rashid, on 16 November 1999. He testified he could identify Rashid's photo. He identified the photo, at p 2 of the passport, P 52, as that of Rashid. He testified he came to know only in court that the name of Rashid, according to the passport, P 52 was 'SHABAN JAHANGIRIEIRD MUSA'. Under cross-examination by the learned DPP, the second accused refuted that Rashid and the SHABAN, in passport, P 52, are two different persons.

[49] The evidence of both the accused has clearly created a serious doubt in the prosecution's case, on the issue of possession of the subject matter of the charge, against both the accused. I am entirely satisfied the apartment was not in exclusive occupation of the accused. There was clear access to the master bedroom by Rashid. There was also access to the apartment by Hassan as he had a set of keys to the apartment. There was also access to the apartment by Amir. No statements were recorded by the police from Rashid, Hassan or Amir, although they were crucial witnesses for the prosecution.

[50] The explanation by the accused that the master bedroom had been occupied by Rashid from 5 November 1999 till 16 November 1999 is credible and believable. The explanation or assertion by both the accused that Rashid and 'SHABAN' in the passport, P 52, are one and the same person cannot be contradicted by the prosecution, because the police did not carry out any investigations on the passport, P 52, which was a current passport, at the material time. As a consequence, any assertion by the prosecution that Rashid is a fictitious character introduced by the defence cannot avail the prosecution. I am entirely satisfied that the bag, P 84, is the bag brought by Rashid into the apartment on the evening of 16 November 1999, and taken out again by him when he left the apartment at about 8.00 p.m, saying he was going to spend the night in the apartment of his friend above that of the first accused, on the 8th floor. I accept the evidence of the second accused that he did not throw any bag out of the bathroom window of the master bedroom. The second accused was merely a visitor to the apartment who had come from Johor Bahru to catch a flight to Teheran. He had no connection with the master bedroom. There is no evidence that the first accused told the second accused to throw anything out of the bathroom window of the master bedroom. The purported circumstantial evidence adduced by the prosecution is suspect and doubtful.

[51] In respect of the box found in the store (P 76) and inside which was found a blue plastic bag (P 77), and from which was recovered a clear plastic package with a black substance (P 78), forming the subject matter of the second charge against the first accused, I have no hesitation in giving the benefit of the doubt to the first accused and making a finding, on a balance of probabilities, that the said box (P 76) was one of the boxes placed in the store by Rashid when he came to occupy the apartment on 5 November 1999, bringing with him two or three luggage bags and two or three boxes, as testified by the first accused.

[52] For the reasons already set out above, both the accused are acquitted and discharged in respect of both the charges. The prosecution has failed to establish,

beyond reasonable doubt, that the subject matter of the charge is, in law and in fact, raw opium, and that the accused were in possession of the said raw opium, at the material date, time and place.

Both accused acquitted and discharged.

Reported by K Krishnan